5. Stokes's application included the following statements pertinent to this proceeding:

> The project is not located in a residential area and doesn't require any construction other than a small concrete footing for the tower. . . .
>
> The site varies five to ten feet on the one acre land, but since there is only a small concrete footing for the tower, there is no erosion potential. . . .
>
> The existing tower is not tall enough to meet the engineering specifications of our new authorization from the FCC. No buildings, parking areas, or signs are involved, just a new tower. . . .

6. On August 25, 1992, the District Commission issued Land Use Permit #3R0703 (the permit) to Stokes and Idora Tucker authorizing them to replace the 120-foot tower with a 300-foot tower. On that date the District Commission also issued supporting Findings of Fact and Conclusions of Law (the findings).

7. Condition 1 of the permit states:

> The project shall be completed as set forth in Findings of Fact and Conclusions of Law #3R0703 in accordance with the plans and exhibits stamped "approved" and on file with the District Commission, and in accordance with the conditions of this permit and findings of fact. No changes shall be made without the written approval of the District Environmental Commission.

8. Condition 6 of the permit states:

> Any material change to the exiting [sic] utility shed or other existing improvements, or increase in lighting, or increase in tower height and visibility shall first be approved by the District III Environmental Commission.

9. The findings, which are based upon oral and written representations of Stokes, contain the following statements relevant to this proceeding:

> 8. Aesthetics, Scenic Beauty, Historic Sites or Natural Areas:
>
> . . .
>
> (B) The proposed tower would be either at the same spot or within twenty feet of the existing tower. The existing tower would remain erect until the proposed tower is functional. Testimony.
>
> (C) The proposed tower will be painted white and bright orange, and have two red beacon aircraft warning lamps at the top and obstruction lamps at the midpoint. The top lamps are required to be 620 or 700 watts each, with aviation red color filters, and to produce between 12 and 40 flashes per minute. Two lamps of 116 or 125 watts will be installed at the middle height of the tower and encased with aviation red obstruction light globes, designed for aircraft visibility. Exhibit 9.
>
> (D) The tower and all four lamps would be visible from surrounding property. Testimony.
>
> (E) Based on our general knowledge of the Randolph topography and our interpretation of the U.S.G.S. map contours, we conclude the tower and four lamps would be visible from Interstate 89 for at least several miles in either direction, north or south-bound. The tower lights might be visible for as much as five miles from the interstate. Exhibit 5.
>
> (F) The applicants require the proposed height of 300 feet to achieve the necessary effective power as described under criterion 1-Air Pollution, incorporated by reference. If the tower were lowered, it would need more power that would likely significantly interfere with radio and television reception. Exhibit 13, Testimony.

(G) The project is in a rural area, known for its scenic quality when viewed from the interstate or elsewhere within the township. The proposed 300 feet tower, with its red lights, would not be in harmony with these surroundings. Testimony.

10. Operation of Stokes's radio station is regulated by the Federal Communications Commission (FCC). In June 1989 Stokes applied for an FCC permit to erect a 303-foot communications tower. On July 24, 1992, Stokes received authorization from the FCC to construct the tower.

11. One of the purposes of the new 303-foot tower is to increase Stokes's FM broadcasting power from 3,000 watts to 25,000 watts to provide a better signal. The increase in power is achieved by increasing the height of the tower from 120 feet to 303 feet and by installing a more directional antenna.

12. The change in height and gain of the antenna allow Stokes to increase the efficiency of the tower without increasing the amount of electrical energy used. To achieve the same performance as a 303-foot tower, the existing 120-foot tower would require installation of a larger transmitter and use of substantially more electricity, which would increase radio frequency fields in the immediate vicinity of the tower and increase the potential for local interference.

13. At the District Commission hearing, Stokes testified that in addition to improving the performance of his radio station, the tower would be equipped with antennas to serve Randolph's ambulance and emergency organizations, Gifford Medical Center, and the Town's police and public works departments.

14. At the hearing, Stokes testified that the 120-foot tower had a cross-section of 18 inches, and that the new tower would have an "equally narrow profile."

15. In January 1992, Stokes had contact with representatives of the PC Cellular Phone Company about leasing space on the tower. On June 19, 1992, Brian Schaffer of Contel Cellular, Inc. (Contel) called Stokes and asked for information about renting space on the tower. Stokes sent Schaffer a letter describing the company's facilities and the tower location. The letter further stated, under "Our deal":

> Tower and facilities charge: $500/month. We would also like to do a trade deal with you for phones and service in exchange for radio advertising. . . .

16. At the time of the hearing, Stokes had contact with cellular telephone companies about the possibility of their leasing space on his tower, but no lease arrangements had been worked out.

17. On September 17, 1992, Stokes contacted Contel's Atlanta office by telephone. For the first time, Contel discussed with Stokes Contel's requirements for cellular telephone service on the tower. The telephone conversation was confirmed by letter dated September 18, 1992 from a Contel engineer to Stokes.

18. By letter dated October 9, 1992, Stokes confirmed his understanding of the agreement. An outline of the final agreement was communicated in a letter dated October 15, 1992 from Contel to Stokes. A sublease agreement dated February 4, 1993 was signed by representatives of Contel and Stokes.

19. Stokes and Contel subsequently agreed that Contel would construct the tower and antennas and finance them in exchange for five years' rent-free use of the tower. After five years, the tower would become the property and responsibility of Stokes.

20. The agreement between Contel and Stokes allows Contel to place a 12 by 28 foot equipment building at the base of the tower, as well as to install four to seven cellular whip antennas as near the top of the tower as possible. The initial term of the lease is five years. At the end of the initial term, Contel has an option to renew and extend the lease for five additional terms of five years each.

21. The sublease also provides that Contel will pay all legal expenses after the first $1,000 associated with this proceeding and that Contel will remove the tower if the Board either revokes the land use permit or denies the application on appeal.

22. In order for Contel to achieve maximum coverage for its cellular telephones in mountainous terrain, the higher the tower, the better.

23. After receiving the permit, Stokes initiated construction of a 303-foot tower that is more than 36 inches wide; a 28-foot by 12-foot building on a concrete foundation to house Contel's equipment; and a 4-foot by 12-foot concrete pad for a back-up generator. The construction at the tower site also included the erection of an ice bridge, which is a structure approximately 8 feet high by 60 feet long, running from the existing utility shed to the new Contel building, the purpose of which is to protect the transmission line from falling ice. The construction also included a 6-foot high chain link fence that encloses the new tower, the utility shed, new ice bridge, and new Contel building and concrete pad.

24. Subsequent to the construction of the tower, Stokes attached four Contel "whip" antennas and six two-way antennas to its 303-foot tower. Stokes's FM antenna was then placed below the Contel antennas. The FM antennas are comprised of five bays. They are 40 feet high and are placed on the side of the tower and run vertically up and down the tower. These were covered by 2-foot by 4-foot protective coverings called radomes. The 20-foot whip antennas are attached to the top of the tower. The six two-way antennas have been placed on the tower vertically; each antenna requires approximately 30 feet of vertical space on the tower. Six two-way antennas now take up approximately 180 feet of vertical space on the tower. New mounting arms were also attached to the tower which added to its overall dimensions and visibility.

25. Radomes are protective coverings to prevent icing on the antenna bays, made from rust-colored plastic. They completely enclose the bays. Each radome is approximately 12 inches high and 27 inches wide, with what are described as "stovepipes" 12 inches high protruding from both the top and the bottom of each structure. Each of the five bays has a radome structure. The radomes add considerable bulk to the tower and make it more visible.

26. The tower and associated facilities and structures constructed under Stokes's supervision and control were different from Stokes's representations to the District Commission prior to and during the hearing in the summer of 1992.

27. Stokes did not seek or receive approval from the District Commission for the construction of Contel's building or the concrete pad, the ice bridge, or the

chain link fence. Stokes also did not seek or receive approval from the District Commission to install radomes or Contel's antennas on the tower.

28. Stokes did not identify Contel to the District Commission as a potential designer, engineer, contractor, or user of the proposed tower.

29. Stokes did not contact the District Commission prior to making changes to determine whether an amendment to the permit would be required.

30. An acceptable engineering alternative to placing the two-way antennas vertically on a tower is to place the two-way antennas horizontally, one next to the other. Up to eight antennas can be placed horizontally on a tower so that they take up only 30 feet of vertical space. The more antennas placed horizontally, the more complex it is to engineer the placement for reception. Although vertical placement is easiest, two antennas placed horizontally on the tower is only slightly more complex. As the number of antennas is increased within a defined horizontal space, the more complex the engineering becomes. Two or three antennas placed side by side on the tower can be easily engineered, as long as the antennas have the same frequency.

31. Another engineering alternative would be diplexing and mounting transmitters and receivers onto the same antenna. This method allows several transmitters to share the same antenna.

32. In order to comply with Federal Aviation Administration (FAA) and FCC safety requirements, towers which exceed 200 feet in height must be painted in alternating bands of orange and white. Red flashing lights must be placed at the top of the tower and non-flashing white lights must be placed at the midpoint of the tower.

33. The top of the tower has two red 620-700 watt lights that flash at approximately 30 flashes per minute. At the mid-point of the tower there are two 116-125 watt red lights. One or both lights are clearly visible in the night sky from any vantage point from which the tower can be seen. They are visible from at least four miles in all directions; on a clear night the blinking lights can be seen from Berlin Hill almost 20 miles away.

34. The base of the tower is located at an elevation approximately 1480 feet above sea level. The top of the tower is higher than any hilltop within a four mile radius. It rises more than 230 feet above the tallest trees that surround it.

35. The tower is located approximately two miles from Interstate 89.

36. As one travels north on the Interstate, the tower is minimally visible. It is never directly in the front view of the traveler, and to see it a traveler must turn and look back at an angle that ranges from 95 degrees to 150 degrees.

37. The tower is more visible to southbound travelers on I-89. The tower is visible for up to 1.5 minutes along a 1.6 mile stretch of road for a traveler driving at 65 miles per hour.

38. The landscape viewed from the Interstate has very high visual quality. Historically the Town of Randolph has had the highest number of working farms in Orange County. The views from the Interstate in the area are typical of the classic Vermont rural landscape and include views of open fields, farmsteads with clustered silos, and a background of rolling wooded fields. Most of the industries and commercial land uses in the Randolph area are located in or close to Randolph Village. Some small-scale commercial uses are located along Route 66 near the Randolph interstate exit.

39. In the viewshed area of the tower, cultural elements such as farmsteads, homes, and institutional buildings are all of traditional New England village scale. Buildings are in the height range of 25 to 40 feet with church steeples reaching somewhat higher.

40. A predominant feature of the area is Vermont Technical College's 120-foot high water tower.

41. The Village of Randolph Center is on the National Register of Historic Places. It has the typical compact character of a Vermont village with a high concentration of outstanding buildings, and its hilltop location provides a broad panoramic view from the village.

42. The Two Rivers Ottauquechee Regional Plan states that "prominent ridge lines, mountain tops . . . can be readily viewed as public corridors along with

exceptional agricultural and historic areas, recognized as outstanding resource values." The Plan also states: "Where land development or subdivision is proposed in the scenic areas highly visible from the public corridor, design plans should work toward the goal of minimizing the adverse visual impacts . . . in ways that reduce the apparent scale of the project on the site."

43. The Theken property abuts the tower site to the west, the residence of Mrs. LaFrance abuts the tower to the south, and the Smith residence abuts the tower site to the east. The residence of Mr. and Mrs. Sax is across the street and south-east of the Smith residence and has a clear view of the tower from its living room window and front yard. The tower is visible from all these places. The lights on the tower are highly visible at night.

44. The Lake Champagne Campground is directly adjacent to the tower. It is approximately 150 acres and can accommodate approximately 130 families or groups. It often hosts 400 or more people on peak season weekends. The majority of people come from out of state and are drawn to the unique rural and pastoral character of the area. Of the total 130 campsites, 105 have direct views of the tower. The open character of the campground provides very little vegetative screening of the tower. The presence of the tower, especially at night, diminishes the rural Vermont environment associated with a camping experience.

45. The tower is also visible from the north along "Pickles Pond Road," from the South Randolph Road and Davis Road, from several town roads around Randolph Center, from Randolph Village, from several roads on Braintree Hill west of the Interstate, from the entry to the State Veterans Association Cemetery on Furnace Road and from the cemetery itself.

46. Several of the historic homes in Randolph Center have a clear view of the tower from their north and east windows. The lights on the tower heighten its visibility at night.

47. Stokes has proposed to install devices on the tower lights that will shield them. The light shields are bowl shaped and about 48 inches in diameter. They consist of ring-type louvers angled to shield light

below the horizontal plane. The shields will be 90 to 100 percent effective in reducing the visibility of the lights below the horizontal plane of the lights.

IV. CONCLUSIONS OF LAW

A. The Board deliberated on the Permittee's request to disqualify Ms. Kaplan and decided that Ms. Kaplan would continue to assist the Board in the drafting of the decision in this case. The Board does not find Ms. Kaplan's assistance will bias its decision making in this case.

B. Revocation

Board Rule 38(A) provides the following, concerning revocation, in pertinent part:

> (2) Grounds for revocation. The board may after hearing revoke a permit if it finds that: (a) The applicant or his representative willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information in connection with the permit application, and that accurate and complete information may have caused the district commission or board to deny the application or to require additional or different conditions on the permit; or (b) the applicant or his successor in interest has violated the terms of the permit or any permit condition, the approved terms of the application, or the rules of the board; or (c) the applicant or his successor in interest has failed to file an affidavit of compliance with respect to specific conditions of a permit, contrary to a request by the board or district commission.
>
> (3) Opportunity to correct a violation. Unless there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation, the board shall give the permit holder reasonable opportunity to correct any violation prior to any order of revocation becoming final. For this purpose, the board shall clearly state in writing the nature of the violation and the steps necessary for its correction or elimination. These terms may include conditions, including the posting of a bond or payments to an escrow account, to assure compliance with the board's order. In the case where a permit holder is

responsible for repeated violations, the board may revoke a permit without offering an opportunity to correct a violation.

The first part of Rule 38(A) requires a determination of whether Stokes "willfully or with gross negligence submitted inaccurate, erroneous, or materially incomplete information" to the District Commission. A review of the facts leads us to conclude that in its description of the project in the application materials and at the hearing, Stokes submitted inaccurate, erroneous, and materially incomplete information to the District Commission, in the following respects:

1. The new tower was constructed approximately 40 feet west of where Stokes said the tower would be located.

2. Stokes told the District Commission that the tower cross-section would be the same as the 120-foot tower (18 inches) but in fact it is more than twice that size.

3. Stokes's application stated: "The project . . . doesn't require any construction other than a small concrete footing for the tower." Stokes did not tell the District Commission that a 28 foot by 12 foot building with a concrete foundation, a concrete pad for a back-up generator, an ice bridge, or a chain link fence would be constructed at the tower site.

4. Stokes did not disclose that radomes would be installed around the antenna bays or that mounting arms would be installed, both of which increase the visibility of the tower.

Based upon the evidence in the record, it is not clear to the Board whether or not Stokes willfully or with gross negligence submitted the inaccurate, erroneous, or materially incomplete information. We therefore do not find that grounds for revocation exist based upon this standard in Rule 38(A)(2).

The second inquiry under Rule 38(A) is whether Stokes violated "the terms of the permit or any permit condition, the approved terms of the application, or the rules of the board." In this respect, the Board does find that there would be grounds to revoke the permit, unless an amendment permitting the above noted deviations were obtained.

Condition 1 of the permit requires that the project be completed in accordance with the findings and the representations of the permittee, and states: "No changes

shall be made without the written approval of the District Environmental Commission." A number of changes, as enumerated above, were made without review or approval by the District Commission. Thus Condition 1 of the permit was violated by Stokes's failure to seek and obtain District Commission approval prior to making changes in the project.

Because Stokes's negotiations with Contel were not substantial until after the permit was issued, the Board does not find that Stokes should have disclosed Contel's property interest in the project for the District Commission to determine whether Contel should be a co-permittee pursuant to Board Rule 10(A), which states in pertinent part:

> The application shall list the name or names of all persons who have a substantial property interest, such as through title, lease, purchase, or lease option, right-of-way or easement, in the tract or tracts of involved land by reason of ownership or control and shall describe the extent of their interests. The district commission or board may, upon its own motion or upon the motion of a party, find that the property interest of any such person is of such significance that the application cannot be accepted or the review cannot be completed without their participation as co-applicants.

However, because Contel now holds a substantial property interest in Stokes's installation, the Board does require Contel to be a co-applicant in the amendment application requested in this order.

Violation of a permit constitutes grounds for revocation of the permit. Under Rule 38(A), however, unless there is a clear threat of irreparable harm to public health, safety, or general welfare or to the environment by reason of the violation, or the permit holder is responsible for repeated violations, the Board must provide an opportunity for the permittee to correct the violation prior to any order of revocation becoming final.

We do not find that the failure to receive District Commission approval prior to commencing the unauthorized construction presents a clear threat of irreparable harm, nor do we find that there have been repeated violations. Accordingly, we will provide an opportunity for Stokes to

correct the violations in order to avoid revocation of the permit. The violations may be corrected by the filing of a permit amendment application and receipt of a permit amendment as specified in the order, below.

Stokes argues that the changes made to the project have no potential for impacts and that therefore the District Coordinator can issue an administrative amendment pursuant to Board Rule 34(D). We do not agree.

Board Rule 34(A) states:

> An amendment shall be required for any material or substantial change in a permitted project, or any administrative change in the terms and conditions of a land use permit.

"Substantial change" is defined at Rule 2(G) as

> any change in a development or subdivision which may result in significant impact with respect to any of the criteria specified in 10 V.S.A. section 6086(a)(1) through (a)(10).

"Material change" is defined at Rule 2(P) as

> any alteration to a project which has a significant impact on any finding, conclusion, term or condition of the project's permit and which affects one or more values sought to be protected by the Act.

The changes made to the project are material because they are alterations which may have significant impacts on the District Commission findings which describe the project differently from what was actually constructed. However, due to the particular circumstances of this case, including the facts that the installations on the ground are not visible from off-site and that the view of the tower from Interstate 89 is a distant one, the Board does not find that the changes to the permitted project are substantial changes as defined by Rule 2(G).

C. Criterion 1(air)

The issue on appeal with respect to Criterion 1 is whether the tower will interfere with television and radio reception. Based upon the unrefuted testimony of Stokes that the tower will not interfere with television and radio reception in the area, and Stokes's representation that the

FCC requires Stokes to satisfy any complaints of "blanketing interference" during the first year of operation with the taller tower, we conclude that Criterion 1 is satisfied.

D. Criterion 8(aesthetics, scenic and natural beauty)

10 V.S.A. § 6086(a)(8) requires that, prior to issuing a permit for the proposed project, the Board must find that the project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics . . . .

The Board's review under Criterion 8 must be based upon the project as reviewed by the District Commission. That is, while it is obviously difficult to distinguish between the authorized and unauthorized antennas on the tower, that distinction is made in this decision, and only the visual effect of the project for which the District Commission issued a permit is addressed here. The District Commission will review the changes made that were not authorized by the permit when it previously considered Stokes's amendment application. See Re: Quechee Lakes Corporation ("Ridge Condominiums"), #3W0364-1A-EB, Findings of Fact and Conclusions of Law and Order (Feb. 3, 1987). In that case, the permittee made unauthorized changes while constructing its condominium project and then sought a permit amendment to authorize the changes. On appeal, when reviewing whether the changes had an undue adverse effect on aesthetics, we stated: "The question to be decided in this appeal is . . . whether the changes constructed by QLC, when coupled with the original project, have [an undue adverse effect on aesthetics]."
Id. at 12.

The Board uses a two-part test to determine whether a project meets Criterion 8. First, it determines whether the project will have an adverse effect. Second, it determines whether the adverse effect, if any, is undue. Re: Quechee Lakes Corp., Applications #3W0411-EB and #3W0439-EB, Findings of Fact, Conclusions of Law and Order at 18-19 (January 13, 1986).

With respect to the analysis of adverse effects on aesthetics and scenic beauty, the Board looks to whether a proposed project will be in harmony with its surroundings or, in other words, whether it will "fit" the context within which it will be located. In making this evaluation, the Board examines a number of specific factors, including the nature of the project's surroundings, the compatibility of the project's design with those surroundings, the suitability for the project's context of the colors and

materials selected for the project, the locations from which the project can be viewed, and the potential impact of the project on open space. Id. at 18.

We believe that the 303-foot tower has an adverse effect on the aesthetics and scenic beauty of the area. The tower is visible from many places in the area, and it is out of character with the highly scenic classic rural Vermont landscape in which it is located.

In evaluating whether adverse effects on aesthetics and scenic beauty are undue, the Board analyzes three factors and concludes that a project is undue if it reaches a positive conclusion with respect to any one of these factors, which are:

a. Does the project violate a clear, written community standard intended to preserve the aesthetics or scenic beauty of the area?

b. Does the project offend the sensibilities of the average person? Is it offensive or shocking because it is out of character with its surroundings or significantly diminishes the scenic qualities of the area?

c. Has the Applicant failed to take generally available mitigating steps which a reasonable person would take to improve the harmony of the proposed project with its surroundings?

Quechee at 19-20.

With respect to the first factor, the Two-Rivers Ottauquechee Regional Plan, which encourages minimizing adverse visual impacts in highly visible scenic areas, does provide a clear, written community standard for minimizing visual impacts of development along ridgelines as seen from highly traveled corridors. However, the Board does not find that the tower, as built, violates this standard in the day time.

With respect to the second standard, we believe that a distinction must be made between the tower during the day and the tower at night. Although the tower is out of character with the landscape, we do not find that it unduly diminishes the scenic qualities of the area. It is visible from the Interstate for only a short period of time. Even though it is visible from a number of other places in the area, it does not dominate the landscape.

However, the lights increase the visibility of the tower so that it dominates the landscape and unduly diminishes the aesthetic quality of the nighttime sky.

Stokes has proposed installing shields on the lights so that their visibility except to aircraft is greatly reduced. Based upon Stokes's representations, the Board finds this to be reasonable mitigation of the adverse aesthetic impact of the lights at night. Accordingly, the Board will require Stokes to install shields on the tower lights that result in substantial (75-90 percent) reduction in the direct visibility of the lights, not including light reflected or refracted by fog, clouds, or precipitation, below the horizontal plane of the lights.

With respect to the Appellants' suggestions that the visibility of the tower could be mitigated by a shorter tower with antennas installed on the tower horizontally rather than vertically, the Board does not find that this would reduce the visibility of the tower. A shorter tower with antennas branching off horizontally would be at least as visually intrusive as a tall, thin tower with antennas stacked vertically.

Accordingly, we conclude that with the visibility of the night lights reduced substantially by the installation of shields, the tower will not create an undue adverse effect upon aesthetics and scenic and natural beauty.

## V. ORDER

1. Stokes has not complied with, and is therefore in violation of, Land Use Permit #3R0703 by making changes to the project prior to approval from the District Commission. This permit will be revoked unless the following corrective measures are taken:

On or before **January 26, 1994**, Stokes and Contel, as co-applicants, shall file an application for an amendment to the permit to authorize i) the new location of the tower; ii) the actual size of the tower's cross-section; iii) the Contel building and concrete foundation at the tower site; iv) the concrete pad for a back-up generator; v) the ice bridge; vi) the chain link fence; and vii) all the antennas, radomes, mounting arms, and any other structures or appurtenances that are now or in the future will be attached to the tower. Stokes shall diligently pursue the amendment application and shall respond to requests from the District Commission for additional information within two weeks of such requests.

2. Land Use Permit #3R0703-EB is hereby issued. Jurisdiction is returned to the District #3 Environmental Commission.

Dated at Montpelier, Vermont this 13th day of December, 1993.

ENVIRONMENTAL BOARD

Elizabeth Courtney, Chair
Ferdinand Bongartz
Terry Ehrich
Lixi Fortna
Arthur Gibb
Samuel Lloyd
Jean Richardson
Steve E. Wright

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EXHIBIT E



# In re Stokes Communications Corporation

[664 A.2d 712]

No. 94-208

Present: Allen, C.J., Gibson, Dooley, Morse and Johnson, JJ.

Opinion Filed July 21, 1995

1. **Administrative Law—Judicial Review—Statutory Provisions**

   Eligibility to appeal an Environmental Board order to the Supreme Court is strictly limited to those parties expressly designated in the statute. 10 V.S.A. § 6085(c).

2. **Administrative Law—Judicial Review—Statutory Provisions**

   In appropriate circumstances, V.R.A.P. 29 may provide the proper avenue for an interested person, who is not a statutory party, to participate in the appellate process arising from a decision of the Environmental Board. 10 V.S.A. § 6085(c); V.R.A.P. 29.

3. **Administrative Law—Judicial Review—Statutory Provisions**

   Because adjoining landowners were not proper parties to appeal and had not requested permission to join it as amicus curiae, their participation in briefing and argument before Supreme Court was inappropriate and would not influence Supreme Court's decision. 10 V.S.A. § 6085(c); V.R.A.P. 29.

4. **Administrative Law—Judicial Review—Generally**

   Supreme Court review of an Environmental Board decision is limited.

5. **Administrative Law—Judicial Review—Jurisdiction**

   Supreme Court affords great deference to the Environmental Board's interpretation of Act 250 and has often recognized the Board's special expertise in determining whether it has jurisdiction over a particular development; absent compelling error, court would uphold the Board's decision regarding the scope of its authority.

6. **Environment and Natural Resources—Environmental Protection—Permits**

   Pursuant to 10 V.S.A. § 6081, in towns with permanent zoning and subdivision bylaws, construction of improvements for commercial purposes on a tract or tracts of land, owned or controlled by a person, involving more than ten acres of land requires an Act 250 permit. 10 V.S.A. § 6081.

7. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

   In determining amount of land involved for jurisdictional purposes, the area of the entire tract or tracts of involved land owned or controlled by a person will be used. Envtl. Bd. R. 2(A)(2).

8. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

   Act 250 jurisdiction turns on whether the amount of involved land exceeds ten acres. Envtl. Bd. R. 2(A)(2).

9. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

   For purposes of determining jurisdiction based on amount of involved land, subject project exceeded the jurisdictional minimum, because entire ninety-three-

and-one-half-acre tract was involved land where leased one-acre parcel was created out of a ninety-three-and-one-half-acre lot owned by lessor and there was no doubt that the one acre was contiguous to lessor's remaining ninety-two-and-one-half acres. Envtl. Bd. R. 2(A)(2).

10. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

Environmental Board Rules 2(F)(2) and (3) pertain to tracts which are physically separate from the improved tract. Envtl. Bd. Rs. 2(F)(2) and (3).

11. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

The Environmental Board could not disregard lessor's ownership interests simply because lessee as the developer also maintained an interest in the parcel; under such an approach, developers could circumvent the administrative process by simply leasing parcels which do not exceed the jurisdictional thresholds.

12. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

There was no reason why the Environmental Board should not require swift compliance with its directives, when the conflict between its order and a Federal Aviation Administration determination was purely speculative.

13. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

There was no evidence that compliance with both the Environmental Board and the Federal Aviation Administration (FAA) would be impossible; in fact, the testimony was quite the opposite where developer's expert testified that based on his understanding of FAA regulation, the light shields required by the Environmental Board would comply and the FAA would approve the use of the shields on the developer's transmission tower.

14. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

Because there was no showing of an inevitable collision between the Environmental Board's order requiring installation of light shields on transmission tower and a Federal Aviation Administration ruling, there was nothing to prevent the Board from imposing an otherwise lawful condition.

15. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

Time given to comply with the Environmental Board's order requiring installation of light shields was reasonable where developer had not shown how or why sixty days was an insufficient time period to install the shields.

16. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

It has been the Environmental Board's practice to require applicants to take generally available mitigating steps to reduce the negative aesthetic impact of a particular project and although the Board has not defined the term "generally available mitigating step," it has applied the term broadly.

17. **Environment and Natural Resources—Environmental Rights and Actions—Particular Matters**

A generally available mitigating step to reduce the negative aesthetic impact of a particular project is one that is reasonably feasible and does not frustrate the project's purpose or Act 250's goals.

18. Environment and Natural Resources—Environmental Rights and Actions—Particular Matters

In some circumstances, mitigating steps to reduce the negative aesthetic impact of a particular project may be unaffordable or ineffective; in those circumstances, it is within the Environmental Board's discretion to grant or deny a permit. 10 V.S.A. § 6086(c).

19. Environment and Natural Resources—Environmental Rights and Actions—Particular Matters

Neither the possibility of federal disapproval nor the novelty of the light shields required by the Environmental Board rendered the devices generally unavailable where based on developer's representations to the Environmental Board, light shields had been manufactured, purchased and installed for use on at least one other tower, there was no suggestion that the shields posed a technological, logistical or financial impediment, and developer's expert testified that with installed shields, developer's transmission tower would comply with Federal Aviation Administration (FAA) regulations and likely receive FAA approval.

**Appeal** from an Environmental Board decision, challenging the Board's jurisdiction over appellant's 303-foot communications tower and the Board's authority to condition appellant's land use permit on the installation of light shields on the tower. Environmental Board, *Gibb*, Acting Chair, presiding. *Affirmed.*

*Stephen R. Crampton* and *Dennis R. Pearson* of *Gravel and Shea*, Burlington, for Appellant.

*Gerald R. Tarrant* of *Tarrant & Marks*, Montpelier, for Appellees.

*Jeffrey L. Amestoy*, Attorney General, *John W. Kessler*, Assistant Attorney General, and *Kevin Forjette*, Law Clerk (On the Brief), Montpelier, for Amicus Curiae State of Vermont.

**Allen, C.J.** Stokes Communications, Inc. appeals from an Environmental Board decision, challenging the Board's jurisdiction over its 303-foot communications tower and the Board's authority to condition Stokes's Act 250 permit on the installation of light shields on the tower. We affirm.

Stokes owns and operates a commercial radio station in Randolph, Vermont. In 1982, Stokes leased one acre of a ninety-three-and-one-half acre parcel owned by Idora Tucker. The one-acre parcel was located on the crest of a small hill near Randolph Center, Vermont. With Tucker's consent, Stokes constructed a 120-foot radio transmission tower to service its radio station on the parcel. It did not obtain or apply for an Act 250 permit at that time.

In 1992, Stokes decided to increase the tower's broadcast power by extending its height and improving its transmission facilities. After plans for the 303-foot replacement tower were approved by the Federal Communications Commission (FCC), Stokes renegotiated its

lease with Tucker. Stokes agreed to pay an amount equal to the annual real estate taxes on Tucker's entire tract in exchange for a thirty-year lease, renewable for one five-year term. At the same time, Stokes approached the district coordinator for Environmental District 3 to discuss whether an Act 250 permit would be required for the new tower. The district coordinator suggested that a permit would be necessary.

Stokes applied for a permit in July 1992. Five adjoining landowners intervened and were allowed to participate on criterion (1) (air pollution) and criterion (8) (aesthetics, scenic and natural beauty). See 10 V.S.A. § 6086(a) (identifying ten criteria for evaluating permit applications). After a hearing, the district commission concluded that the taller tower would not result in undue air pollution, but the tower, equipped with four Federal Aviation Administration (FAA) required aircraft warning lamps, would pose an adverse aesthetic impact. The commission granted a permit for the replacement tower, reasoning that there were "no generally available mitigative steps that would improve the harmony of the proposed project." The adjoining landowners appealed, challenging the commission's decision on criteria (1) and (8).

Stokes commenced construction in January 1993. The adjoining landowners moved to stay the construction, arguing irreparable harm. Later that same month, Stokes moved to dismiss the appeal, challenging the Environmental Board's jurisdiction. It argued that because an Act 250 permit was required only for developments involving more than ten acres of land, its one-acre leased parcel did not trigger the Board's jurisdiction. In March, the Board denied the adjoining landowners' motion to stay, but warned Stokes that in the event the Board "denies or modifies the permit, [Stokes] will have to restore the site to its preconstruction condition." The Board also denied Stokes's motion to dismiss, concluding that the amount of involved land exceeded the jurisdictional minimum of ten acres.

During the pendency of appeal, Stokes negotiated with Contel Communications to sublease space on the tower for Contel's cellular telephone service. As part of the contract, Contel agreed to finance and construct the tower and antennas, but with extensive modifications. Stokes neither applied nor received approval for these changes. The adjoining landowners filed a motion to revoke Stokes's permit, claiming that the actual construction exceeded the scope authorized by the August 1992 permit. The Board consolidated the motion to revoke with the underlying appeal.

Following a de novo hearing, the Board found that construction deviated from the permit. The tower was twice the authorized width

and was equipped with four additional "whip" antennas. A forty-eight square-foot concrete slab for a backup generator was embedded near the tower, and a twelve-by-twenty-eight-foot equipment building was erected at its base. In addition, a new eight-foot-high, sixty-foot long ice bridge spanned between the existing utility shed and the new equipment building. All of the structures were enclosed by a six-foot high chain-link fence. After finding that the district commission had not authorized these changes, the Board concluded that there were grounds for revocation, but directed Stokes to apply for and diligently pursue an amended permit.

With respect to criterion (1), the Board agreed with the commission that the taller tower was more efficient and would cause no undue air pollution. Under criterion (8), the Board found that the 303-foot tower required four aircraft warning lights and bright orange stripes to comply with the FAA regulations for towers over 200 feet. Because the tower's lights "increase the visibility of the tower so that it dominates the landscape and unduly diminishes the aesthetic quality of the nighttime sky," the Board concluded that the tower would cause an adverse aesthetic impact. The Board explored alternatives to mitigate the effect of the warning lights. At the conclusion of the proceedings, the Board ordered Stokes to install light shields around the aircraft beacons within sixty days to ensure compliance with criterion (8). The Board then issued an amended permit and remanded to the district commission for further proceedings on the unauthorized changes. Both Stokes and the adjoining landowners moved to alter the decision, primarily challenging the Board's authority to impose the light shield requirement without prior FAA approval. The Board denied the motions.

Stokes now appeals the denial of its motion to dismiss for lack of subject matter jurisdiction and its motion to alter the decision by revising the light shield requirement. The adjoining landowners also filed a brief, requesting this Court to affirm the jurisdictional issue, but reverse and remand the light shield requirement. In addition, the Attorney General requested and was granted status as amicus curiae. He presented essentially the same arguments as the adjoining landowners.

[1–3] Before we address the merits, we consider the adjoining landowners' standing to participate in this appeal. Eligibility to appeal an Environmental Board order to this Court is strictly limited to those parties expressly designated in the statute. *In re George Adams & Co.*, 134 Vt. 172, 174, 353 A.2d 576, 577 (1976). Section

6085(c) states: "For the purposes of appeal only the applicant, a state agency, the regional and municipal planning commissions and the municipalities required to receive notice shall be considered parties." 10 V.S.A. § 6085(c); see also *id.* § 6089(b) (appeal from decision of board shall be to supreme court as set forth by § 6085(c)). In *In re Wildlife Wonderland, Inc.*, 133 Vt. 507, 518-19, 346 A.2d 645, 652 (1975), we held that an adjoining property owner lacked standing to participate in the appeal to this Court even though he had appeared before the district commission and Environmental Board. In appropriate circumstances, V.R.A.P. 29 may provide the proper avenue for an interested person, who is not a statutory party, to participate in the appellate process. See, e.g., *In re Taft Corners Assocs.*, 160 Vt. 583, 588-89, 632 A.2d 649, 652-53 (1993) (interested property owners participated in appeal as amicus curiae after initial request to participate as appellees was refused). Because the adjoining landowners are not a proper party to this appeal and have not requested permission to join it as amicus curiae, their "participation in briefing and argument before this Court [is] inappropriate," and will not influence our decision. *In re Wildlife Wonderland*, 133 Vt. at 519, 346 A.2d at 652. The Attorney General is a proper participant because of his amicus status.

[4, 5] We now turn to the jurisdictional issue.* Our review of the Board's decision is limited. We afford great deference to the Board's interpretation of Act 250 and have often recognized the Board's special expertise in determining whether it has jurisdiction over a particular development. *In re Taft Corners Assocs.*, 160 Vt. at 590, 632 A.2d at 653; *In re Denio*, 158 Vt. 230, 235, 608 A.2d 1166, 1169 (1992). Absent compelling error, we will uphold the Board's decision regarding the scope of its authority. *In re Taft Corners Assocs.*, 160 Vt. at 590, 632 A.2d at 653.

[6–8] Pursuant to 10 V.S.A. § 6081, in towns with permanent zoning and subdivision bylaws, such as Randolph, construction of improvements for commercial purposes on a tract or tracts of land,

* Amicus argues that Stokes should be estopped from challenging jurisdiction because it waited five months after receiving its initial permit to challenge the Board's jurisdiction. This objection was never brought to the Board's attention by the adjoining landowners. 10 V.S.A. § 6089(c) (no objection that has not been urged before the Board may be considered by the Supreme Court). Because amicus was not a party below, it could not properly preserve the issue for appeal. Nevertheless, we need not decide the propriety of the estoppel claim, because of our disposition of the jurisdictional issue.

owned or controlled by a person, involving more than ten acres of land requires an Act 250 permit. See 10 V.S.A. § 6001(3) (defining development); *Committee to Save the Bishop's House, Inc. v. Medical Ctr. Hosp. of Vt.*, 137 Vt. 142, 151, 400 A.2d 1015, 1020 (1979). In determining amount of land involved for jurisdictional purposes, "the area of the entire tract or tracts of involved land owned or controlled by a person will be used." Envtl. Bd. R. 2(A)(2). "Involved land" is defined as:

> (1) The entire tract or tracts of land upon which the construction of improvements for commercial or industrial purposes occurs; and
>
> (2) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which is incident to the use of the project; and
>
> (3) Those portions of any tract or tracts of land within a radius of five miles owned or controlled by the same person or persons, which bear some relationship to the land actually used in the construction of improvements, such that there is a demonstrable likelihood that the impact on the values sought to be protected by Act 250 will be substantially affected by reason of that relationship.

*Id.* 2(F). Thus, Act 250 jurisdiction turns on whether the amount of involved land exceeds ten acres.

The Board has construed a "tract of land" for jurisdictional purposes to include all contiguous land in common ownership, regardless of the functional relationship between the parcels. We affirmed this construction in *In re Gerald Costello Garage*, 158 Vt. 655, 656, 614 A.2d 389, 390 (1992) (mem.).

[9] In the present case, the one-acre parcel was created out of a ninety-three-and-one-half-acre lot owned by Tucker. There was no doubt that the one acre was contiguous to Tucker's remaining ninety-two-and-one-half acres. Tucker was the record owner of parcels; therefore, she was the owner of the tract upon which the improvement was located. The Board concluded, and we agree, that the project exceeded the jurisdictional minimum, because Tucker's entire ninety-three-and-one-half-acre tract was involved land.

Stokes contends that the amount of involved land is only one acre. It reasons that because the improvements on the one-acre parcel bear no functional relationship to the remaining acreage owned by Tucker,

the one-acre parcel is a separate and distinct tract. In support of its theory, Stokes relies on our decision in *Bishop's House*, in which we held that "land is involved within the meaning of 10 V.S.A. § 6001(3) only where it is incident to the use within the meaning of that section, or where it bears some relationship to the land actually used in the construction of improvements." 137 Vt. at 153, 400 A.2d at 1021. Notably, subparts (2) and (3) of Rule 2(F) reflect that decision. Stokes also argues that, by virtue of its nonrenewable thirty-year lease with Tucker, it effectively "owns and controls" the one-acre parcel. We disagree.

[10] Stokes's emphasis on *Bishop's House* and Rule 2(F)(2) and (3) is misplaced. Rules 2(F)(2) and (3) pertain to tracts which are physically separate from the improved tract. Rule 2(F)(1) addresses the size of the tract upon which the improvements are located. In this instance, Rule 2(F)(1) is controlling. See *In re Costello Garage*, 158 Vt. at 656, 614 A.2d at 390 (contiguous parcels held in common ownership are involved land under Rule 2(F)(1)).

[11] Moreover, we are not persuaded by Stokes's argument that the nature of its particular agreement amounted to ownership and control of the parcel. While the thirty-year lease provided Stokes with limited ownership interests, see *Guild v. Prentis*, 83 Vt. 212, 214, 74 A. 1115, 1116 (1910) (lessee allowed to maintain action as owner to recover treble damages for trespass), Tucker remained the record owner of the parcel. The Board may not disregard Tucker's ownership interests, simply because Stokes as the developer also maintained an interest in the parcel. See *In re Spencer*, 152 Vt. 330, 337-38, 566 A.2d 959, 963 (1989) (rejecting argument that jointly owned parcel was separate and distinct from individually owned parcel for jurisdictional purposes). Under Stokes's approach, developers could circumvent the administrative process by simply leasing parcels which do not exceed the jurisdictional thresholds. In light of the Legislature's goals, we cannot endorse such a tactic.

Stokes's second challenge is to the Board's authority to require the installation of light shields. Stokes argues that the Board acted beyond its authority by requiring the installation of the light shields regardless of FAA approval and by not providing sufficient time to lawfully comply with such a condition. Stokes reasons that because the FAA's regulatory scheme over the nation's airspace is pervasive, prior FAA approval must be sought.

First, we do not construe the Board's order as imposing a condition regardless of FAA approval. The Board acknowledged the FAA's

overlapping jurisdiction and that Stokes would have to obtain FAA approval. It is fair to infer from the Board's comment that it realized the FAA could preempt its light shield requirement.

[12] Second, as the Board concluded, "the fact that . . . [Stokes] may have to obtain FAA approval for the light shields does not prevent the Board from exercising Act 250 jurisdiction over the tower with regard to the light shields." The Board is an independent regulatory body with supervisory powers over environmental matters. *In re Hawk Mountain Corp.*, 149 Vt. 179, 185, 542 A.2d 261, 264 (1988). Pursuant to 10 V.S.A. § 6086(c), the Board may impose reasonable permit conditions within the limits of its police power to ensure that projects comply with the statutory criteria. See *In re Denio*, 158 Vt. at 239-40, 608 A.2d at 1172; *In re Quechee Lakes Corp.*, 154 Vt. 543, 550 n.4, 580 A.2d 957, 961 n.4 (1990). The Board is not obligated to delay its decision to accommodate concurrent state agency rulings. See *In re Hawk Mountain*, 149 Vt. at 185, 542 A.2d at 264 (Environmental Board not bound by approval or permits of other state agencies when imposing conditions for Act 250 permits). Under these circumstances, we see no reason why the Board should not require swift compliance with its directives, when the conflict between its order and an FAA determination is purely speculative.

[13–15] "[S]tate law is pre-empted to the extent that it actually conflicts with federal law," *English v. General Electric Co.*, 496 U.S. 72, 79 (1990), but there is no actual conflict where a collision between two regulatory schemes is not inevitable. See *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 143 (1963); see also *English v. General Electric*, 496 U.S. at 90 (rejecting preemption argument that injured employees would forgo federal relief and rely solely on state remedies as too speculative). There was no evidence that compliance with both regulatory authorities would be impossible. In fact, the testimony was quite the opposite; Stokes's expert testified that based on his understanding of FAA regulation, "the shields will comply and the FAA will approve the use of the shields on the Stokes's tower." Additionally, Stokes has not offered any substantive support, such as citations to FAA regulations, suggesting that installing light shields prior to FAA approval is prohibited or that the shields would violate established requirements. Because there has been no showing of an inevitable collision between the Board's order and an FAA ruling, there is nothing to prevent the Board from imposing an otherwise lawful condition. Further, Stokes has not